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No. 80-1765

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,
v.
HYDROLEVEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an organization of competitors which conducts a process to determine market entry for others has a public duty to safeguard the objectivity of its process.
2. Whether evidence that a standard-setting organization met its duty to safeguard its processes against conflicts of interest is admissible in its defense that it did not engage in an unreasonable restraint of trade and was not an intentional participant in a conspiracy.
3. Whether the law of agency can foreclose a standard-setting organization from introducing this evidence in its defense.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Commission for Health Certifying Agencies, Inc. (National Commission) moves for leave to file the attached brief as amicus curiae.

1. **The amicus curiae has a substantial interest in the outcome of this case.**

The National Commission is a non-profit membership organization which sets standards for competency evaluation programs for health occupations in the United States.[1] These competency evaluation programs, or cer-

[1] The members of the National Commission for Health Certifying Agencies who have met the Commission's standards are: American Medical Technologists; Board of Registry of the American Society of Clinical Pathologists; Commission on Dietetic Registration of the American Dietetic Association; Credentialing Commission of

tifications, are used to communicate important information about quality of personnel to employers, consumers, public and private insurance agencies and government authorities. Although the standards set by the National Commission remain largely voluntary, states, insurance carriers, employers, and the federal government, through agencies such as the Centers for Disease Control, Office of Personnel Management, Health Resources Administration, Federal Trade Commission, Veterans Adminis-

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the International Society for Clinical Laboratory Technology; Dental Assisting National Board; Division of Examiners of the American College of Nurse-Midwives; National Board of Chiropractic Examiners; National Board for Respiratory Therapy; National Certification Agency for Medical Laboratory Personnel; National Commission on Certification of Physician's Assistants; National Registry of Microbiologists of the American Society for Microbiology.

Other organizations which are members of the Commission but which do not certify are: American Academy of Physician Assistants; American Association for Respiratory Therapy; American Association of Bioanalysts; American Dental Assistants Association; American Hospital Association; American Orthotic and Prosthetic Association; American Society of Allied Health Professions; American Society for Medical Technology; Contact Lens Society of America; Minnesota Department of Health; National Federation of Societies for Clinical Social Work; National Society for Histotechnology; Society of Nuclear Medicine.

Conditional members of the Commission are: American Board for Certification in Orthotics and Prosthetics; American Board of Opticianry; American Certification Council for Medical Rehabilitation Therapists and Specialists; American College of Nursing Home Administrators; American Registry of Diagnostic Medical Sonographers; Biofeedback Certification Institute of America; Commission on Rehabilitation Counselor Certification; Joint Commission on Allied Health Personnel in Ophthalmology; Liaison Council on Certification of the Association of Surgical Technologists; Nuclear Medicine Technology Certification Board.

The National Association for Music Therapy is a Commission affiliate. Approximately twelve other organizations are currently involved in seeking membership in the National Commission.

tration, and National Institute for Alcohol Abuse and Alcoholism, consult extensively with the National Commission and rely on its processes as fair, valid and objective statements serving the public interest.[2]

This case involves safeguards against conflicts of interest in the setting of health, safety and other important standards. Thus, the National Commission and its members may be significantly affected by the outcome of the case. Approximately one million health care practitioners practice under competency determinations made by the member organizations of the National Commission. In addition, several million other individuals employed in health and non-health disciplines have been evaluated under standards formulated by the National Commission. Consequently, the opinions of the National Commission on the use of organizational structure and procedures to safeguard against conflicts of interest have national importance.

2. The amicus curiae offers substantially different analysis of significant questions of fact and law.

Our analysis differs from that of petitioner and all other standard-setting amici, as we believe the focus of this and other standard-setting cases must be on the

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[2] Standards promulgated by the National Commission establish the following requirements, among others, for voluntary agencies certifying members of health occupations and seeking National Commission membership: public members must be involved in the governance of certification programs; representatives of the certified profession similarly must be involved; certification examinations must be valid and reliable measurement instruments; cut-off scores on certification examinations must be technically defensible; requirements for certification must not include excessively high academic requirements that could operate unfairly to restrict entry into the job market, limit minority opportunities, or protect high labor costs; certification boards must be administratively independent from professional associations (which have a clear interest in high entry standards); and individuals who fail to obtain certification must have a right of appeal. These concepts reflect safeguards against conflicts of interest in certification.

process of standard-setting and on the *duty* of standard-setting organizations to the public to arrange this process so as to safeguard it against inherent commercial and political conflicts of interest. We believe that the law of conspiracy and its broad proof requirements govern this case, and that undue reliance upon concepts of "agency" or "subjective agent intent" is erroneous, would mislead the lower courts in future standard-setting conspiracy cases, and would leave the public without adequate protection in an area vital to their well-being.

We conclude that the Court of Appeals, the American Society of Mechanical Engineers (ASME) and the other amici have severely underestimated the importance of this Court's decisions affecting professionalism in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and the decision concerning professional self-regulation in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

We take no position whatever on the alleged liability of ASME.

We believe this case will and should affect the quality of the entire system of private decision-making on matters of public trust for years to come.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE NATIONAL COMMISSION FOR HEALTH CERTIFYING AGENCIES

INTEREST OF THE AMICUS CURIAE [1]

The interest of the amicus curiae is set forth in the motion for leave to file as amicus curiae. That motion is annexed to this brief.

COUNTERSTATEMENT OF THE CASE

This summary of the facts is drawn from the opinion of the Court of Appeals, 635 F.2d 118 (1980), and the Joint Appendix (J. App.).

[1] The National Commission is grateful for the substantial assistance of Tresa Schlecht, a candidate for admission to the District of Columbia Bar, and Vickie Bennett, M.S.W., in the preparation of this brief.

Hydrolevel Corporation (Hydrolevel) made safety devices to protect the public against personal injury and death from exploding boilers.

The American Society of Mechanical Engineers (ASME) conducts a process for establishing and interpreting standards for boilers and over 400 other devices. These standards are relied on by the public and incorporated in state legislation as impartial and objective evaluations of quality. ASME represents them to be such.

In 1971-1972 two ASME members, selected by ASME to interpret standards, were paid by competitors of Hydrolevel and intentionally used their positions in the ASME standards program to drive Hydrolevel out of the boiler safety device business.

The chief ASME members who were selected by ASME to interpret standards and who participated in this scheme were Messrs. T. R. Hardin, executive vice-president of Hartford Steam Boiler Inspection and Insurance Company (Hartford, the country's leading seller of boiler insurance to the industry) and John James, vice-president of research at McDonald & Miller (M&M, a corporation manufacturing up to 85 percent of the float cutoffs that were directly competitive with Hydrolevel's probe device). Hardin and James secretly drafted a letter to ASME requesting a code "interpretation." The ASME "answer" was written by Hardin, but signed by Mr. W. Bradford Hoyt, an ASME official who routinely signed such letters without supervising or reviewing the conditions of their preparation or their content. This misleading letter was used by M&M to disparage Hydrolevel's product to the trade.

The affair came to the attention of the public in June 1974 through the work of a reporter for the *Wall Street Journal*, Ms. Priscilla S. Meyers. Shortly after Meyers' first article concerning ASME was published, Mr. Paul

T. Howse, Jr., a member of ASME's governing board and ASME regional vice-president, wrote the ASME president, Dr. Rogers B. Finch, in July 1974:

> If the facts are as stated in the article, it would seem that Mr. James should not only be relieved of his duties on the boiler code committee but he should also be kicked out of ASME for unethical conduct. J. App. 99.

Thereafter, ASME's Professional Practice Committee (PPC) conducted an official investigation and promulgated a resolution which was circulated to ASME's 90,000 members, public libraries and others through ASME's official magazine, *Mechanical Engineering*. That November 19, 1974 resolution stated: "PPC investigated the entire [Hydrolevel] incident and found no basis for further consideration of the issue." J. App. 103. This official resolution commended James for his "forthright manner," condemned "harassment" of ASME members serving "in their line of duty," and concluded that ASME procedures for handling code interpretation inquiries were "extremely well-founded." J. App. 104.

In March 1975, Hydrolevel's concerns received more detailed attention in the forum of the United States Senate. In testimony before the Senate Subcommittee on Antitrust and Monopoly, James admitted his destruction of relevant and material documents.

The Court of Appeals did not conclude that ASME maintained a serious, systematic program to prohibit, detect, investigate, or discipline conflict of interests. Hardin and James were never disciplined by ASME.

On February 14, 1979, a jury sitting in the United States District Court for the Eastern District of New York found ASME to be a co-conspirator to an unreasonable restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. On Novem-

ber 24, 1980, the judgment of liability under Section 1 was affirmed by the United States Court of Appeals for the Second Circuit.

SUMMARY OF ARGUMENT

Standard-setting organizations have a duty to safeguard their processes against conflicts of interest.

An important antitrust problem in standard-setting is that conflicts of interest can impair the objectivity of judgment and exclude competitors. The solution to this problem is for the organization to use structures and procedures which satisfy the technical interest in competence, the public interest in objective judgment of quality, and the antitrust interest in avoiding wrongful market exclusions.

If an organization does this, it has complied with its duty to the public. Evidence of an organization's structures and procedures are admissible in its defense to show that, because it met its duty to safeguard against conflicts of interest, its conduct was reasonable under the Rule of Reason and that it did not intentionally participate in a conspiracy to restrain trade.

Traditional law of agency alone is not a suitable concept to evaluate the overall standard-setting process under the antitrust laws.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT AN ORGANIZATION OF COMPETITORS WHICH SETS STANDARDS TO CONTROL MARKET ENTRY HAS A PUBLIC DUTY TO SAFEGUARD ITS STANDARD-SETTING PROCESS AGAINST CONFLICTS OF INTEREST

A. Preliminary Statement

The private standard-setting process, which is the subject of this case, affects the daily life of each American:

> Trade product standards are an area of our economy known to few consumers. Yet, as is often the case with such backwaters of corporate activity, trade standards have an enormous impact on our lives. Over 20,000 trade standards at least partly determine the safety, availability and price of products ranging from household gas stoves to nuclear reactors. For consumers, trade product standards determine such things as the length of shoelaces, width of auto tires, ingredients of house paint, the specifications of lawn mowers, sizes of door frames, and safety of child car seats.

Curran, "Industrial Standards, Antitrust and the Logic of Public Action: An Historical Search for a Rational Public Policy," 17 Duq. L. Rev. 717, 717-18 n. 4 (1978).

Individuals and organizations are prohibited by the antitrust laws from joining with others to restrain trade. If they do so, they may be liable for triple the amount of damages which their joint action causes.

Some standard-setting organizations are groups of competitors which jointly set conditions for participation in a market or occupation. The integrity of standard-setting can be compromised by conflicts of interest. These conflicts threaten objective evaluation and can decrease quality, increase prices, thwart innovation, and completely

exclude a new competitor. These results can, in some instances, violate the antitrust laws. At the same time, the antitrust laws also recognize that private standard-setting can make significantly procompetitive contributions to quality, price, innovation, and the climate of a vigorous, competitive market. Technical expertise is essential to intelligent standard-setting, and those who maintain this expertise on a day-to-day basis through work in the field are able to apply knowledge and insight difficult to obtain elsewhere.

The solution to the antitrust dilemma in standard-setting is for the process to reconcile the technical professional requirements of expertise, the public interest in impartial and objective evaluation (particularly where health and safety are concerned) and the economic interest in eliminating unreasonable barriers to entry.

The principle that evidence of a standard-setting organization's process is admissible in an antitrust case is the rule of law which assures the successful balancing of these interests.

This brief will discuss in some detail how the antitrust laws apply to the standard-setting process, and examine why the analysis of the panel and ASME is inaccurate.

B. The Duty to Safeguard Against Conflicts of Interest Derives from Powerful Sources.

In its opinion below, the Court of Appeals correctly held that ASME, as an organization of competitors, had a duty to safeguard its processes:

> ASME's widespread influence through its Code carries with it a corresponding duty to guard against the misuse of such influence.

635 F.2d at 122. The Court's holding continued:

> [T]here is a corresponding duty to be aware of and guard against the temptations thus afforded by in-

> herent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences.

Id. at 126.

In short, the panel held that a standard-setting organization of competitors has a duty to establish safeguards against conflicts of interest. The National Commission supports this position.

The most fundamental source of the duty is the standard-setting process itself. To be reliable, the process must be objective and impartial. Conflicts of interest destroy fragile but cherished objectivity.

Standard-setting has a responsibility to provide truthful commercial information to the public. Consumers have a First Amendment right to receive truthful commercial information free from restraint. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Yet conflicts of interest directly jeopardize the truthfulness of standard-setting information. The technical nature and confidentiality of much standard-setting frequently leaves the public with no basis for receiving or evaluating information concerning quality beyond the very decision produced by the process itself.

Because the market cannot readily adjust for standard-setting errors after the fact—especially where human health and safety are concerned—conflicts of interest must be forestalled through proper procedures *at the outset*. The standard-setting *organization* directly controls its own processes, and the *organization* bears the duty to safeguard against conflict-of-interest dangers through those processes. Standard-setting organizations assure the public that they provide a process for im-

partial and objective judgments. State legislatures accept those statements and incorporate codes into state law, and the public expects standard-setting to be free from conflicts of interest.

Moreover, self-regulation in the public interest includes the duty to provide procedural safeguards to ensure high ethical standards. *See Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1973). Prohibitions against conflicts of interest are one such important ethical standard. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 521, 549 (1964).

A further source of the duty is the responsibility of professionals to avoid conflicts of interest. This stems partly from their professional responsibility to use knowledge objectively. *See* Barber, "Some Problems in the Sociology of the Professions," in THE PROFESSIONS IN AMERICA 18 (K. Lynn Ed. 1965). It also stems from their responsibility to serve the public. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978), *citing Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n. 17 (1975).

Anticompetitive conflicts of interest are a subject of concern to the antitrust laws. In *Goldfarb*, for example, this Court ruled that associations "may not foster anticompetitive practices for the benefit of their members." 421 U.S. at 791. In that antitrust case, the Court relied on *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), which ruled that a legal requirement that a professional association control a state licensing board can lead to a violation of the Fourteenth Amendment. In addition, the Clayton Act addresses conflicts of interest present in the dual loyalties of certain interlocking directorates. 15 U.S.C. § 19. Finally, the use of organization and pro-

cedure to solve the conflict-of-interest antitrust problem in standard-setting is a familiar solution in the antitrust literature:

> The problem is to organize a standards program which does not promote the interests of one group to the detriment of another, and which permits disinterested resolution of the conflicts created by the participation of persons with a variety of interests.

Wachtel, "Product Standards and Certification Programs," 13 Antitrust Bull. 1, 13 (1968). *See* 16J von Kalinowski, BUSINESS ORGANIZATIONS § 61.04 [1] n. 4 (Rel. 762) (1981), *citing Hydrolevel Corp. v. American Society of Mechanical Engineers*, 635 F.2d 118 (2d Cir. 1980).[2]

The National Commission is an organization which is aware of its duty to safeguard against conflicts of interest, and regards that duty as a serious responsibility. A liability rule which allows it to demonstrate that it has met its responsibility under the Rule of Reason and the law of conspiracy will permit and encourage the National Commission and its members to continue their work.

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[2] *See also* Comment, "Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason," 66 Colum. L. Rev. 1486, 1504-05 (1966); Kissam, "Antitrust Law, The First Amendment, and Professional Self-Regulation of Technical Quality," in REGULATING THE PROFESSIONS 143, 155 (R. Blair & S. Rubin, eds., 1980); Levin, "The Limits of Self-Regulation," 67 Colum. L. Rev. 603, 643 (1967).

II. THE COURT OF APPEALS CORRECTLY RULED THAT IF A STANDARD-SETTING ORGANIZATION MEETS ITS PUBLIC DUTY TO SAFEGUARD ITS PROCESS AGAINST CONFLICTS OF INTEREST, IT IS NOT A CO-CONSPIRATOR TO AN UNREASONABLE RESTRAINT OF TRADE

The question before the Court is whether ASME violated its duty to the public by "intentionally" participating in a conspiracy to drive Hydrolevel out of business. The analysis therefore turns on the meaning of "intent" under the law of conspiracy. The National Commission believes that intent can best be evaluated by looking at whether the standard-setting organization as a whole met its duty to safeguard its processes against conflicts of interest.

A. Intent is an Important Consideration Under the Rule of Reason and the Law of Conspiracy.

Under the Sherman Act, a conspiracy to create an unreasonable restraint of trade is illegal. A standard-setting organization may raise several defenses to allegations that it violated the Sherman Act. Two of the most important defenses are that any restraint of trade was reasonable, and that if any unreasonable restraint did occur, the organization did not *intentionally* participate in it.

To evaluate the first of these defenses—the reasonableness of any restraint—the law considers the nature of the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). The nature of certain types of restraints such as price-fixing are so completely without competitive justification that they are declared illegal *per se*. The nature of other types of restraints may have procompetitive justifications. Those restraints and justifications are governed by an analysis known as the Rule of Reason. Because objective and valid standard-setting processes can foster higher quality, lower costs, increased innovation and ease of market entry, standard-setting is governed by the Rule of Reason. *See*

Maple Flooring Manufacturers Association v. United States, 268 U.S. 563, 566 (1925); 16J von Kalinowski, BUSINESS ORGANIZATIONS § 61.04[1] (1981).

In evaluating the reasonableness of any standard-setting restraints under the Rule of Reason, the courts look to intent because it "may help the Court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. at 238. The presence of safeguards, and the rigor with which they are applied, are important in demonstrating an organization's intent. Other factors important in a Rule of Reason case are the facts peculiar to the business in which the restraint is applied, the history of the restraint, the reasons for its adoption, and as already noted, the nature of the restraint itself. *Chicago Board of Trade v. United States*, 246 U.S. at 238. These factors may be used to evaluate intent.

Conflict-of-interest safeguards are ethical norms which may be procompetitive and are therefore governed by the Rule of Reason. In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978), this Court stated:

> Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.

The unreasonableness of the conspiracy to drive Hydrolevel out of business is not disputed now by ASME. However, ASME does dispute the jury finding that it intentionally participated in that conspiracy.

B. The District Court Correctly Instructed the Jury on the Law of Conspiracy.

In his charge Judge Weinstein instructed the jury that ASME must have "intentionally" participated in a conspiracy before it could be held liable. He also told the jurors that "intentional" participation has a special meaning under the law of conspiracy. He informed them that knowing acquiescence, pervasive participation in a com-

mon scheme or plan, the natural or probable consequences of acts, and specific intent are *all* tests for knowing, *intentional* participation under the law of conspiracy. J. App. 1006, 1007, 10011, 1012, 1018. These instructions were correct. *E.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 146-47 (1948); *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966); *Eastern States Lumber Association v. United States*, 234 U.S. 600, 612 (1914).

In addition to this basic conspiracy charge, Judge Weinstein also instructed the jury that ASME was liable for its agents' acts only if:

1. ASME ratified the acts; *or*
2. ASME agents acted to advance ASME's interest.

Although the instruction was favorable to ASME, the jury found in favor of Hydrolevel. Thus any error in this instruction was harmless.

Since the basic conspiracy instructions were correct, this Court would ordinarily limit review to the sufficiency of the evidence on conspiracy. In this case, however, the Court should go beyond evidentiary review and correct the seriously misleading analysis of the Court of Appeals.

C. The Court of Appeals Correctly Stated the Basic Elements of a Conspiracy in a Standard-Setting Case.

The Court of Appeals ruled that ASME was liable as a co-conspirator because three conditions were met:

1. *Unreasonableness.* "The effect and intent of the . . . interpretive letter and its subsequent misuse by M&M" created an unreasonable restraint of trade by wrongfully driving Hydrolevel out of business, 635 F.2d at 124;
2. *Participation.* ASME was liable because Hardin acted with "apparent authority," 635 F.2d at 124-25; *and*

3. *Safeguards.* ASME failed to provide "check or supervision" to "guard against" both "temptations thus afforded by inherent conflicts of interest" and "misuse of ASME's influence." 635 F.2d at 125.

In effect, the Court of Appeals held that as one type of evidence, a standard-setting group may show to a jury that it carefully safeguarded its processes against conflicts of interest. If this has been done, the defendant organization has shown that it was not an intentional participant because: it did not knowingly acquiesce; it did not join a common plan; the natural and probable consequences of its acts were not to restrain trade unreasonably; and it had no specific intent to become a member of a conspiracy.

The Court of Appeals correctly established the elements of a standard-setting conspiracy case. However, it reached this result without using antitrust concepts. It selected "apparent authority" as the focus of its analysis to describe the standard-setting organization's participation in the conspiracy. This analysis is misleading as applied to the law of conspiracy.

D. The Court Will Avoid Future Confusion by Discussing Conspiracy in Traditional Antitrust Terms.

1. *The Method for Proving Intent Should Be Clarified.*

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), this Court set forth the correct method of evaluating proof in an antitrust conspiracy case:

> The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but by looking at it as a whole.

This fundamental rule of proof is essential in antitrust conspiracy cases, for proof on the conspiracy issue is often circumstantial. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939).

In contrast to this broad rule of proof, a rule which would restrict proof to the technical common-law requirements of agency would improperly substitute form for substance in conspiracy cases. *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). Surely the issue of whether an individual is or is not an "agent" is not controlling in the evaluation of the existence of conspiracy. *E.g., United States v. Masonite Corp.*, 316 U.S. 265, 276-77 (1942).

In a standard-setting case, the determination whether an organization intentionally participated in a conspiracy turns on the actual processes of the organization. These processes may include procedures for disclosure of conflicts of interest, structure of committees to achieve the broadest representation of interests, fair and broadly based development and interpretation of standards, selection and involvement of public representatives, and discipline. The most probative evidence of intent is what the organization at large did to prohibit, inquire into, investigate and discipline for conflicts of interest *before* any abuses, *cf. Silver v. New York Stock Exchange*, 373 U.S. at 348 n.5, and what it did after an abuse to redress the situation.

2. *The Law of Conspiracy and Its View of Agents Should Be Clarified.*

The Court of Appeals altered the rules of evidence by reverting to narrow agency principles instead of relying on the trial record. 635 F.2d at 124-126. This Court should correct the error.

As a sole determinant of liability, traditional agency rules as used by the Court of Appeals and ASME impair the ability of standard-setting organizations to demonstrate intent and are clearly unworkable for a variety of reasons. These reasons include: (a) the nature of conspiratorial danger; (b) traditional use of agency law in conspiracy cases; (c) the relationship between standard-

setting organizations and the public; (d) the clear trends in agency and private association law; (e) new problems facing the nation which the standard-setting community must be equipped to address; and (f) technical defects in the use of apparent authority and actual authority in conspiracy cases.

(a) The Court of Appeals squarely rested its direct use of agency law to confer treble damage liability on an analogy. The analogy centered on the liability of principals for the torts of their agents under the Restatement of Agency. This analogy was erroneous. Treble damages for civil antitrust conspiracies are imposed due to the dangers of injury created by *joint* action. Only single damages are imposed upon principals for injuries caused by agent conduct. Before treble damages can be imposed under the antitrust laws, the jury must find both intent and *concerted* action.

(b) The Court of Appeals also did not review how the law of conspiracy treats agents. As previously explained, the major focus of conspiracy is intent. In conspiracy, where an agent (James or Hardin) acts intending to benefit an entity (M&M or Hartford), his acts become those of the entity (M&M or Hartford).

The case law illustrates this principle in two ways. In civil or criminal *per se* price-fixing conspiracy cases, an agent who fixes prices intends at least in part to benefit his company—and the company is responsible. *See United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1976). Secondly, where an agent intends to benefit himself or a company *other* than his own, he then is capable of conspiring with his *own* company. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469-70 (1962); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *See also* 16 von Kalinowski, BUSINESS ORGANIZATIONS, § 6.01[2] and cases

cited therein. By using its apparent agency analysis, the Court of Appeals ignored the intent of James and Hardin to benefit *M&M and Hartford*, not ASME.

Under traditional conspiracy law, the analysis would be: (i) James and Hardin acted for M&M and Hartford and were therefore capable of conspiring with ASME; (ii) the procedures which ASME agents designed before the action of James and Hardin, and the actions ASME agents took afterward, are relevant evidence of ASME's intent; (iii) the actions of James and Hardin are relevant in interpreting ASME's intent. Conspiracy law would *not* attribute the acts of James and Hardin to ASME, and no case cited by ASME (other than *Hydrolevel*) is to the contrary.

(c) The use of agency law here misconceives the public's relationship with the standard-setting process. The public relies on the imprimatur and influence of the professional organization. The public is largely indifferent to individual actors within the organization.

Traditional agency analysis is artificial as applied here. ASME acted much as an agent of the public in setting standards. *See* Kaplin, "Professional Power and Judicial Review: The Health Professions," 44 Geo. Wash. L. Rev. 710, 724-25 (1976). James and Hardin acted as ASME's sub-agents. But as co-conspirators, James and Hardin were not acting as agents on behalf of the public. Any traditional agency analysis which ignores ASME's relationship to the public or which imputes any acts or intent of James or Hardin to the public is clearly inapplicable in this setting.[3]

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[3] The result in *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922), relied on by ASME, was rejected by statute in Section 301(e) of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(e). Congress felt that the actual authority analysis used to deny liability there for the acts of an international union did not reflect the significant responsibilities of unions to their members and the public. *UMW v. Patton*, 211 F.2d 742, 747-50 (4th Cir.), *cert. denied*, 348 U.S. 824 (1954).

(d) Current trends in agency law also suggest the limitations of agency concepts in standard-setting. After the limitations of the doctrine of actual agency authority became clear, the more flexible doctrine of apparent authority developed to confer liability on principals. More recently, when the analytic limits of apparent authority were identified, liability of principals was further extended under the doctrine of implied agency power. Restatement (Second) of Agency § 8A. The law should now recognize that traditional agency concepts, however suitable they were for simple one-to-one business relationships, are outmoded as tools for the evaluation of the wide-ranging public responsibilities of standard-setting organizations today. Indeed, old notions of self-regulating associations as "private clubs," unaccountable to the public, already have been rejected. *Silver v. New York Stock Exchange*, 373 U.S. at 351. *See* Kaplin, "Professional Power and Judicial Review: The Health Professions," 44 Geo. Wash. L. Rev. at 725.

The Second Restatement of Agency takes no position on the applicability of agency law to social legislation. Restatement (Second) of Agency, Introduction at 3 (1959). Nor does it take a position on the applicability of agency rules to punitive or treble damage situations. Restatement (Second) of Agency § 217, Comment c (1959). There is no need for this Court to superimpose agency concepts upon the law of conspiracy where the American Law Institute, on which the Court of Appeals so heavily relied, refrained.

(e) Standard-setting organizations will expand activities in extraordinarily sensitive areas, such as genetic engineering and nuclear technology. Report of the President's Commission on the Accident at Three Mile Island 70-71 (1979). The concept of agency completely fails to provide a framework to evaluate contemporary standard-setting responsibilities. These responsibilities sometimes are so complex and profound that they may

require extensive consultations and gradations of decisions—in contrast, for example, to ratification of the acts of a single agent under the model of agency law. In addition, the roles of all involved parties, such as researchers, educators, volunteers, entrepreneurs, professionals and consumers are so intricately interwoven that the other pillar of agency liability—the agent's intent—may be too obscure to identify accurately.

(f) Finally, there are technical flaws with both apparent authority and actual authority in analyzing the standard-setting process in a conspiracy case.

A rule of apparent authority in conspiracy cases, without more, is clearly unsatisfactory. In effect, it would eliminate intent and create a strict liability conspiracy case. But the plaintiff in a conspiracy case must *prove* the issue of conspiracy to the jury; it cannot be decided as a matter of law. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). In addition, a strict liability apparent authority rule would discourage the insurance industry from insuring standard-setting organizations because organizations would then be liable irrespective of their conduct.

ASME's use of actual authority also presents a variety of objectionable features. A corporation acts through its agents. Actual authority requires a showing that the agent intended to benefit the principal. ASME points to agents who lack intent to benefit ASME (James and Hardin)—but it ignores the acts of many others who have that intent and have actual authority (*e.g.*, Hoyt, the resolution committee members, the preparers of ASME standard-setting procedures which contain or lack conflict-of-interest safeguards). Use of the conflicts of interest of selected agents in this manner would divert the antitrust case from the competitive problem of the effect of conflicts of interests on market entry. An actual authority defense would also be counterproductive from

the standpoint of an antitrust counseling, for it would encourage standard-setting organizations to dismantle vital procedural safeguards in order to minimize the involvement of agents who could create liability.

Since actual authority would severely narrow proof of conspiracy intent under the Sherman Act, and the Sherman Act has both civil and criminal features, modification of the elements of conspiracy under the Sherman Act could well affect proof of a conspiracy under the general criminal conspiracy statute, 18 U.S.C. § 371.

The rule of actual authority would seriously undermine this Court's holding in *National Society of Professional Engineers*, for even if a restraint were unreasonable under *Professional Engineers*, an association which created the restraint could escape liability by pointing to a single agent's subjective intent that did not involve benefiting the association. Since intent is relevant under both conspiracy law and the Rule of Reason, *Chicago Board of Trade v. United States*, any alteration in the rules of proof for intent would impair careful analysis of conflict-of-interest prohibitions under *Professional Engineers* where the reasonableness of those restraints, including their intent, is at issue.

E. The Analysis of the National Commission Addresses the Legitimate Concerns of the Amici, the Standard-Setting Community and the Public.

The rule advocated by the National Commission is that a standard-setting organization may defend itself in an antitrust case, using evidence of its actual standard-setting safeguards, to show that any restraint of trade was not unreasonable and that it did not intentionally participate in any conspiracy. The position of the National Commission does not subject standard-setting groups to undue risk of liability, but rather leaves within their control the ability to fashion procedures to fit their individual standard-setting needs.

The rule advocated by the National Commission harmonizes the technical interest and the public interest by encouraging organizations to develop procedures to ensure objective judgment. Most importantly, our solution is realistic and serves the public interest. It would not completely disqualify from participation in standard-setting all who have a commercial interest. Blanket disqualification would injure the professional interest in having expert judgment available and thus would jeopardize the quality of the standard-setting result. Our solution would require standard-setting groups carefully to examine each step in their processes where conflicts of interest could intrude and then structure their processes to limit conflicts of interest appropriately.

III. THIS CASE HAS BROAD SIGNIFICANCE BEYOND THIS SPECIFIC LITIGATION

This case is extraordinarly important, because the Court's decision will direct the entire system of standard-setting. The decision and analysis underlying it will be the framework that a wide variety of groups will use to decide whether to set standards, how to assure accountability to the public, how to structure their organizations and processes, and how best to interact with related organizations and their members.

The distribution of decision-making power between a government that is relinquishing authority and a private sector that is assuming it is being extensively realigned, concurrently with the Courts' consideration of this case. The Court has an unusual opportunity to supply timely predictability to standard-setting organizations and the lower courts.

Of particular concern now is the rapid advance of technologic developments affecting human life and safety. This case can lead the way in the evolution of guidelines that must reconcile the pressures of commercial interests, scientific progress, and public protection.

CONCLUSION

For the foregoing reasons, the National Commission for Health Certifying Agencies urges that the Court rule as follows:

1. In an antitrust conspiracy case, evidence of a defendant standard-setting organization's structure and procedures are admissible on the issues of conspiratorial intent and reasonableness of a restraint of trade under the Rule of Reason.

2. The law of agency cannot foreclose a standard-setting organization from introducing proof on the responsibility of its structures and procedures.

3. If the verdict of the jury in this case is not supported by the evidence, the judgment of the United States Court of Appeals to the Second Circuit should be reversed.

4. If the verdict of the jury in this case is supported by the evidence, the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes Involved

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. *Trusts, etc., in restaint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.